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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion To Dismiss

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION[1]

Pursuant to the Court's Orders dated January 27, 2014 and March 10, 2014, on April 30, 2014 New Mexico filed a Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention in this original action. The City of El Paso ("El Paso") submits this *amicus curiae* brief opposing the motion.

INTEREST OF *AMICUS CURIAE*

The City of El Paso, Texas is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its continued growth and prosperity depend upon having an adequate water supply, made up of both groundwater and Rio Grande Project surface water. In order to moderate its reliance on groundwater from the Hueco Bolson and to confront surface water shortages in drought years, El Paso's water management strategy promotes water conservation, maximizes surface water use, increases use of reclaimed

[1] By Resolution adopted at its regularly scheduled meeting on June 10, 2014, the El Paso City Council unanimously approved the City's filing of this *amicus* brief. *Cf.* S. Ct. R. 37.4 (City not required to file motion for leave).

water, and has also developed desalination of brackish groundwater.[2]

The continued availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project ("Project"). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 ("EPCWID") that entitle the City to receive approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies.

Actions by New Mexico that enable and institutionalize increased demands on Project water through unregulated groundwater pumping in New Mexico, affecting the drain water and irrigation return flows that are part of Project water supply, are a cause of serious concern to El Paso and Texas. Protecting the historical operation of the Project as incorporated in Texas' rights under the Rio Grande Compact – Project integrity – is a direct and sustained interest of all Texas users of Project water, including those such as El Paso that have invested heavily to secure contractual rights for this water supply. Addressing these issues is a matter of critical importance to the almost

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[2] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://www.epwu.org/water/water_resources.html.

750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUPPLEMENTAL STATEMENT

New Mexico has not established that the factual allegations pleaded by Texas and by the United States, taken as true, do not plead claims for which legal relief can be granted in this original action. *Cf.* Fed. R. Civ. P. 12(b)(6); S. Ct. R. 17.2. New Mexico's characterization of Texas' and the United States' claims also ignores a great deal of context, regarding the Rio Grande Compact ("Compact"), Act of May 31, 1939, ch. 155, 53 Stat. 785, and related water rights, and regarding New Mexico's own historical treatment of these issues. El Paso therefore offers the following additional background to show the lack of merit in New Mexico's Motion to Dismiss.

I. A Problem of New Mexico's Creation

A. Notable History of New Mexico's Policy and Practice in the Lower Rio Grande

Since Colorado, New Mexico, and Texas entered into the Rio Grande Compact in 1938, groundwater development in the Lower Rio Grande Basin in New Mexico – the area below Elephant Butte Reservoir and down to the New Mexico-Texas state line – has dramatically increased. As the parties have described, the Lower Rio Grande Basin encompasses both the

City of Las Cruces and the irrigable lands in New Mexico with rights to receive an annual allotment of water supply from the Rio Grande Project. Texas Br. Supp. Compl. Appendices A, B. New Mexico's administration of this portion of the basin is at the heart of the Compact claims in this original action.

For decades, one of the regulatory tools available to the New Mexico State Engineer to address the impacts of groundwater development on hydrologically connected surface water has been the "declaration" by the State Engineer of an underground water basin when the area and boundaries of same are reasonably ascertainable. This declaration is the prerequisite for the State Engineer's further oversight and administration of groundwater rights in that basin, including permitting new wells and imposing conditions to protect senior water rights. Indeed, under New Mexico groundwater law, a permit to appropriate underground waters is only required in basins that have been so declared by the State Engineer. *See* NMSA § 72-12-20 (1978). Under this system, the timing of the underground water basin declaration is critically important – unless and until the State Engineer acts to assert regulatory oversight, there are essentially no limitations on groundwater development and the effects of that development.

An early example of basin declaration was the State Engineer's Order Declaring the Rio Grande Underground Water Basin, issued in November 1956, which delineated the portion of the basin now generally referred to as the "Middle Rio Grande," above

Elephant Butte Reservoir to the Colorado state line and including the Albuquerque area. Among the recitals preceding the description of that basin's area and boundaries, the State Engineer expressly recognized that "the waters of said basin are interrelated with the flow of the Rio Grande Stream System, so that such underground waters are a substantial source of the flow of said stream system," and also that "the waters of the Rio Grande Stream System are fully appropriated." New Mexico Office of the State Engineer, Order Declaring the Rio Grande Underground Water Basin (Nov. 29, 1956), at 1.*[3] The State Engineer's accompanying Memorandum explained the purpose, and the catalyst, for such basin declarations under New Mexico law, as follows:

> The State Engineer defines and declares such basins whenever it becomes apparent that regulation is necessary 1) to prevent impairment of existing rights, 2) to insure beneficial use of water, and 3) to provide for an orderly development of ground-water reservoirs.

New Mexico Office of the State Engineer, Memorandum, Subject: Declaration of the Rio Grande Underground Water Basin (Nov. 29, 1956), at 2.* As background regarding the Rio Grande declaration

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[3] Accompanying the filing of this brief, pursuant to Rule 32.3 *amicus* the City of El Paso has submitted a letter to the Clerk of the Court describing additional documents proposed to be lodged with the Clerk, and has indicated with an "*" those materials when quoted herein.

decision, it further described the State Engineer's longstanding awareness of the "complex water problems that beset the State's largest and most populous river valley," and the review of technical papers describing "the interrelationship of the surface and ground waters of the Rio Grande Valley." *Id.* at 3.

Reiterating that basin surface and ground waters are "intimately interrelated parts of a single supply," in which groundwater withdrawals result "ultimately in an equivalent diminution of surface water flows," *id.* at 4, the State Engineer laid out administrative procedures to govern groundwater development while protecting against impairment of existing water rights. Specifically, the State Engineer required that any approved groundwater appropriation be "offset by the retirement of usage under existing surface rights," with the amounts and timelines of such retirement calibrated to assure that "at all times the total irrigation water retired will fully offset the effects of the ground-water withdrawals on the river." *Id.* at 5. Under these administrative procedures, development of groundwater wells to supplement existing water rights would be permitted, with groundwater diversions during times of limited surface water supply. Other water right amendments, including changes of point of diversion, method of diversion (from surface water to groundwater), and place and type of use, "all will be permitted – provided such changes do not impair existing rights." *Id.* at 6. By this analysis and resulting administrative action, the State Engineer utilized basic mechanisms

available under New Mexico law to impose reasonable checks on unfettered groundwater development in the critically important Rio Grande Basin.

Unfortunately, the contrasting treatment of the Lower Rio Grande Basin in New Mexico does not reflect this same diligence on the part of the New Mexico State Engineer. Several decades later, in 1980 the State Engineer (still S.E. Reynolds) finally declared the Lower Rio Grande Underground Water Basin in Doña Ana County, which encompasses the area below Elephant Butte Reservoir and down to the New Mexico-Texas state line, including the Las Cruces area and the irrigated lands within the Elephant Butte Irrigation District ("EBID"). *See* New Mexico Office of the State Engineer, Special Order No. 126-A, In the Matter of State Engineer Special Order No. 126 Declaring the Lower Rio Grande Underground Water Basin in Doña Ana County (effective Oct. 22, 1980).* Just as with the 1956 Order declaring the Middle Rio Grande portion of the basin, this Order recited the predicate "reasonably ascertainable" boundaries known to exist, and that "the surface and underground waters within the boundaries of this basin are interrelated." Special Order No. 126, at 1.[4]

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[4] Special Order No. 126 (September 11, 1980), contains the recitals and boundary description for the declared Lower Rio Grande Basin, promulgated in the nature of a rulemaking. This was the basis for the subsequent notice and hearing resulting in the basin declaration confirmed by Special Order No. 126-A (October 22, 1980).

In contrast to the 1956 Order, however, for the Lower Rio Grande the State Engineer only acknowledged that "new appropriations of water *might* impair existing rights." *Id.* (emphasis added).

On the face of these two basin declarations, and the larger connected context of the Rio Grande Valley as a whole, it is clear that the Lower Rio Grande portion below Elephant Butte Reservoir could have been declared and administered much earlier, but was not. The timing and purpose of the 1980 Order, moreover, is explained in the accompanying memorandum, which opened with a description of the City of El Paso's just-filed lawsuit in federal court challenging the constitutionality of New Mexico's statute on groundwater export. New Mexico Office of the State Engineer, Memorandum, Subject: Lower Rio Grande (Sept. 10, 1980) ("1980 OSE Memorandum")*; *cf. City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983). Citing El Paso's well applications and concerns about "a rash of speculative drilling" resulting from publicity over the El Paso lawsuit, the agency memorandum recommended basin declaration "to protect existing water rights and insure orderly development of the ground water resource" in the Lower Rio Grande. 1980 OSE Memorandum, at 1. Approxir tely six weeks following the filing of El Paso's l..vsuit the basin was declared and, at least theoretically, subject to administration that would protect senior rights to Project water supply.

Perhaps this declaration was better late than never; however, the result of this substantial delay in

declaring the Lower Rio Grande Basin was that extensive groundwater development by New Mexico entities continued unchecked for many years. By the time of the 1980 declaration, nearly all of the irrigators within EBID had already completed supplemental groundwater wells, which are not subject to the post-declaration offset requirements under declared basin administration. Even after the 1980 declaration, for many years the State Engineer granted permits for wells to supplement Project surface water for irrigation of Project land.

In addition to all of these private supplemental wells, in 2003 EBID itself obtained from the State Engineer a short-term emergency authorization for multiple supplemental wells, intended to make up the shortage in Project surface water supply during ongoing drought conditions. This EBID authorization was for an amount up to 271,920 acre-feet of groundwater, for the irrigation of up to 90,640 acres of EBID acreage with rights to Project water supply. *See* Office of the State Engineer, Memorandum (from E. Fuchs, Lower Rio Grande Basin Supervisor, to John R. D'Antonio, State Engineer), Emergency Application for Permit for Supplemental Wells (May 15, 2003) ("Fuchs Memorandum").* The State Engineer's staff analysis of the EBID emergency application warned that the potential for EBID irrigators to be able to replace their entire annual Project supply with groundwater produced from within the Lower Rio Grande Basin would exacerbate the effects of already

excessive, unregulated pumping that affects connected Rio Grande surface flows. *Id.* at 11.

Over the same time period prior to the 1980 declaration of the Lower Rio Grande Basin, while groundwater use for irrigation was increasing the historical data also show a dramatic increase in municipal and industrial water use by the City of Las Cruces. Around the time of the (1956) Middle Rio Grande Basin declaration, Las Cruces was using approximately 2,500 acre-feet per year; by the time of the (1980) Lower Rio Grande Basin declaration, that amount of annual use had more than doubled, to approximately 6,000 acre-feet per year. Peggy Barroll, Hydrologist, New Mexico Office of the State Engineer, *Tools for a New Era in Water Management* (PowerPoint presentation before the Lower Rio Grande Water Users Association, Aug. 19, 2005) ("Barroll PowerPoint").* Las Cruces' water supply now comes solely from groundwater wells located in the Lower Rio Grande Basin. Las Cruces Amicus Br. at 2.

B. History of New Mexico Public Officials' Concerns Regarding Rio Grande Compact Noncompliance

In stark contrast to New Mexico's assertions in this original action – that the Rio Grande Compact imposes no obligation on New Mexico vis-à-vis Texas other than its required deliveries of Project water into Elephant Butte Reservoir – there is significant contrary history regarding New Mexico's position. For

more than a decade, the Office of the State Engineer ("OSE") has recognized New Mexico's problem with the Lower Rio Grande, and the potential for Texas litigation under the Rio Grande Compact based on the impacts of groundwater depletion in the Lower Rio Grande and resulting impairment of the historical operation of the Rio Grande Project, *i.e.*, Project integrity. The New Mexico Legislature has also recognized the imperative of compact compliance, in providing OSE with further rulemaking authority for alternative priority administration of water allocations in basins (like the Lower Rio Grande) where adjudications remain pending. Over time, there has been a pattern of recognition of New Mexico's looming problem, and sporadic efforts to address it.

As described above, OSE approved an emergency application by EBID for supplemental wells to augment or replace Project water supply during drought conditions. In an expansive memo analysis directed to the State Engineer, the Lower Rio Grande Basin Supervisor described the implications, of the EBID application and the situation generally, as follows:

> Given the interrelated nature of the surface and groundwater system in question, groundwater diversions of the magnitude potentially necessary to serve the [EBID] application or that may occur for years to come despite the application as discussed herein are such that much of the available or remaining mainstem flows of the Rio Grande below

> Caballo Reservoir, *beginning with drain flows within the EBID*, could be negatively and substantially affected almost immediately, although it is uncertain how severe these effects might be. Should drought conditions persist on a multi-year, continuous basis and the supplemental pumping in question continues at or near full capacity, the manner in which the State of Texas will receive a proportional share of Rio Grande Project water and the quality associated with such in future years remains largely uncertain. In the absence of a clear plan of replacement and/or state line delivery strategy and working agreement with the EBID under these circumstances, it must be assumed that the State of New Mexico could eventually be met with a challenge *under the Rio Grande Compact*. However, because most of the EBID (~90%) already has on-farm access to private wells for supplemental purposes and will in all likelihood continue to use them at or near full capacity, the potential for such a challenge may exist regardless of the action taken on the [EBID] application.

Fuchs Memorandum, at 2 (emphasis added); *id.* at 3 (noting "increased potential for a challenge under the Rio Grande Compact"). The Basin Supervisor further cautioned that "[d]espite the *popular belief* that New Mexico's obligations to Texas under the Rio Grande Compact essentially end at the Elephant Butte Reservoir, . . . " if drought conditions persisted it was not clear how Texas would receive its proportional

share of Project water, and thus "the potential for such a challenge and a subsequent, very expensive tour of the US [sic] Supreme Court may exist regardless of the action taken on the EBID's emergency application." *Id.* at 12 (emphasis added). The Basin Supervisor provided a meaningful insight into the challenges faced by New Mexico, stating that "[m]ost efforts of this office and possibly those at the state level to discontinue this [supplemental groundwater pumping] in the field under the current drought conditions will very likely result in mayhem, significant media attention and much political posturing." *Id.* at 2. In the light of these and later statements from within the OSE, New Mexico's current insistence on the lack of any Compact obligation to protect the Rio Grande Project's operational integrity rings hollow.

That same year as the EBID emergency application described above, the New Mexico Legislature took action to provide a means of alternative priority administration for basins such as the Lower Rio Grande with still pending adjudication processes. The stated need for this legislation is telling:

> The legislature recognizes that the adjudication process is slow, *the need for water administration is urgent, compliance with interstate compacts is imperative* and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

NMSA § 72-2-9.1.A (1978) (emphasis added). The statute goes on to require the State Engineer to adopt rules for such priority administration, intended to govern an "Active Water Resource Management" ("AWRM") program administered by OSE.

The New Mexico State Engineer's (then John D'Antonio) subsequent public presentation in 2005 addressing "Active Water Resource Management in the Lower Rio Grande" appears to confirm all the essential allegations of Texas' Complaint in this original action. *See* John D'Antonio, PE, New Mexico State Engineer, *Tools for a New Era in Water Management* (PowerPoint presentation before the Lower Rio Grande Water Users Association, Aug. 19, 2005) (the "D'Antonio PowerPoint").* With the framework of the 2003 legislation, AWRM and the related rulemaking process, Mr. D'Antonio addressed the extent of the problem resulting from groundwater pumping by junior users in the Lower Rio Grande, with surface water fully appropriated. He noted the extent of growing demand for both irrigation and municipal and industrial uses in the area, *id.* at 6, and estimated that "[g]roundwater pumping for irrigation use alone may be as high as 50,000-100,000 AFY in full project supply years[, and] 200,000-300,000 (?) AFY in low project supply years." *Id.* at 7. He presented two problems: First was the "Heavy Reliance on Groundwater While Instituting Few Controls on it," which acknowledged the general seniority of surface water rights in the Lower Rio Grande and summarized data from the late 1950s to the mid-1970s showing that

groundwater pumping "reduces river flow." *Id.* at 8. Second was the "Claims that New Mexico Groundwater Pumping is Affecting Surface Water Flows," which acknowledged the senior surface water right of the Rio Grande Project and capsulized Texas' claim regarding New Mexico's overuse due to effects on surface water. *Id.* at 9.

Perhaps most notably in contrast to New Mexico's current position denying any Compact obligation as pleaded in Texas' Complaint, the State Engineer warned of the risk of an original action in this Court that could result in remedies to address New Mexico's "post-Compact groundwater pumping," *id.* at 10, and he invoked the 2003 New Mexico statute as a response to this risk of compact noncompliance. *Id.* at 11 ("Legislators have admonished the State Engineer not to let the Pecos River history repeat itself anywhere, including on the Lower Rio Grande"). Against this backdrop, Mr. D'Antonio addressed the potential for local cooperation in forms of alternative administration, and also outlined the AWRM rulemaking process relating to the Lower Rio Grande Basin.[5]

A second State Engineer presentation regarding AWRM for the Lower Rio Grande Basin was made at the same August 2005 meeting, in which OSE

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[5] Due to litigation, to date AWRM has not been implemented in the Lower Rio Grande. *But see Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012) (upholding the constitutionality of the AWRM rulemaking authority provided in the 2003 statute).

Hydrologist Peggy Barroll provided a more detailed, quantitative explanation of the competing groundwater demands and related hydrology (the "Barroll PowerPoint," cited above). Among "[t]he Facts We Must Deal With," Dr. Barroll noted that "[g]roundwater and surface water behave as a single resource," and that "[m]ost pumping [was] already established" by the time the prior State Engineer declared the state's jurisdiction over most of the Lower Rio Grande Basin groundwater. Barroll PowerPoint, at 8. Directly pertaining to Texas' claims in this original action, she explained how increased groundwater pumping "dries up" the drain flows that are "Part of the Water Supply of the Rio Grande Project." *Id.* at 10-11. More particularly, she noted that "[h]istorically drain flows have added about 20% to Project diversions," and that "[w]hen the drains are dry, the Rio Grande Project water supply is reduced and Project water cannot be delivered efficiently." *Id.* at 11. This relationship of drain flows as part of Project water supply and Project historical operation, incorporated into the Rio Grande Compact in 1938, is the Project integrity that Texas seeks to protect in this original action. Compl. at ¶¶ 18-20, 24-26.

Dr. Barroll described the State Engineer's (district-specific) AWRM regulations as the means to enforce against over-diversions and also to curtail junior groundwater rights in priority, "to protect the historical operations of the Rio Grande Project[, and] to ensure protection of senior surface water rights owners." *Id.* at 14. More specifically, OSE had set as the

"priority administration target" for the Lower Rio Grande the "historical operating efficiency of the Rio Grande Project since the 1950s (the D2 curve),"[6] until such time as there was a new operating agreement for the Rio Grande Project, *i.e.*, among the United States and the two irrigation districts in New Mexico and Texas. *Id.* at 15. The State Engineer's then-proposed AWRM regulations would have curtailed junior groundwater "if necessary, to ensure that the Rio Grande Project can operate at the level of efficiency described by D2." *Id.* at 23. The significance of the State Engineer's reliance on the Bureau of Reclamation's D2 curve for this regulatory purpose is the recognition that New Mexico has the responsibility to protect the Project's historical operating efficiency reflected in the D2 curve – the historical operating condition that "has been the basis of Rio Grande Project operations for 50 years." *Id.* at 24.[7]

Both Mr. D'Antonio's presentation and Dr. Barroll's more technical presentation addressing New Mexico's

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[6] As Dr. Barroll succinctly laid out in her presentation, the "D2 curve" is a plot of the Project's efficiency, using data from the years 1951-1978, and comparing amounts of water released from Caballo Reservoir for the Rio Grande Project to amounts of Project supply (*i.e.*, divertible water at river headings), which supply is comprised of releases from Project storage, return flows, and any useable inflows to the Rio Grande. Barroll PowerPoint, at 16-17.

[7] El Paso does not take the position that the D2 curve is necessarily the proper standard for protecting Project integrity. Rather, the significance here was the State Engineer's recognition of New Mexico's Compact obligation.

Lower Rio Grande problem were grounded in the State Engineer's clear understanding of New Mexico's obligation to protect Project integrity, as a matter of compliance with New Mexico's obligations under the Rio Grande Compact. With this history of its own legislative and administrative action, New Mexico should not now be heard to claim that Texas has no legal claim under the Rio Grande Compact.

II. Limitations of New Mexico Proceedings as Protection for Texas' Compact Interests

Texas and the United States (then as *amicus curiae*), overcoming New Mexico's opposition, have already demonstrated that this Court, in its original jurisdiction, is the only proper and adequate forum to hear their Compact claims involving preservation of Project integrity. New Mexico's continued argument that its own state laws and proceedings provide sufficient, or even exclusive, remedies to protect Texas' and the United States' interests should again be rejected by denying New Mexico's Motion to Dismiss.

A. Priority Call by the United States

New Mexico suggests in its Motion to Dismiss that the proper and adequate mechanism for the United States to protect its Project water rights is to make a priority call based on its New Mexico appropriations (1906 and 1908), and proceed through New Mexico's administrative processes for such a call or other remedies. N.M. Br. at 21-22, 39, 56-57; *cf.* NMSA §§ 72-1-1 to -12 (1978); *City of Albuquerque v.*

Reynolds, 379 P.2d 73 (N.M. 1962). While that may be a simple and appealing solution in theory, in fact there are very real practical limitations that render a priority call an unlikely solution for the United States (and thus for all the Texas irrigators and entities that have rights to receive Project water). Most recently, these have been raised in pleadings in the Lower Rio Grande Adjudication ("LRG Adjudication") itself, under Stream System Issue 104, regarding the United States' Interests. The presiding judge recently denied all motions for summary judgment regarding the Project priority date or dates, with further proceedings on this issue scheduled. *See* Order, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Feb. 17, 2014) at 4.

Relatedly, the parties in the LRG Adjudication have filed pleadings regarding whether the issues currently pending in Stream System Issue 104 should be stayed pending further proceedings in this original action. The response filed by EBID raises two important concerns that call into question the feasibility of a priority call to protect the United States' Project water rights under New Mexico state law. Defendant EBID's Response to Joint Motion to Stay Proceedings and Brief in Support, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (May 15, 2014).* First, based on the court's prior ruling dismissing the United States' claim to groundwater as part of the Project water rights,[8] EBID correctly

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[8] Order, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Aug. 16, 2012) at 8.

notes that the portion of Project supply comprised of the seepage and return flows necessary for Project function "has not been quantified by the [adjudication] Court and will not be protected by a final decree, and instead will be left for determination in an administrative venue." *Id.* at 3; *see* LRG Adjudication, August 16, 2012 Order, at 6-7.

Second, EBID points to the State Engineer's "position on the Lower Rio Grande where lead counsel for the OSE has consistently noted that a priority call made in the Lower Rio Grande would be futile." *Id.* at 5. For both these reasons – the incomplete scope of Project water rights, not including the return flows that assure Project integrity, and the State Engineer's own position regarding the efficacy of a priority call – a priority call through New Mexico administrative procedures is clearly not a sufficient mechanism to protect the Project's operational integrity incorporated into the Compact apportionment.

B. Lower Rio Grande Adjudication

Even apart from the adjudication court's treatment of issues in Stream System Issue 104, various other decisions and positions taken to date collectively make clear that the LRG Adjudication is not a forum in which Texas' interests, in Project integrity as underlying Texas' rights under the Compact, can be protected. Instead, a central theme is emerging in that proceeding, for generous recognition and even maximizing of New Mexico parties' water rights while

limiting Project rights. A few notable examples well illustrate how the LRG Adjudication is working to the detriment of Texas' rights.

First, the City of Las Cruces has obtained an agreed subfile order that positions it with maximum diversion rights and senior priority, with recognition of 39 supplemental groundwater wells for the City of Las Cruces for municipal and related uses, all with a priority date of 1905. *See* Subfile Order, filed in *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, Subfile No. LRN-28-011-0078-A (Aug. 31, 2005).* The total authorized diversion from this series of supplemental wells is 21,869 acre-feet per year, even though the 1905 priority date extended to the entire series of wells was based on a single Las Cruces well drilled by the City at that time.

Second, New Mexico State University (NMSU), another major non-Project water user and also located in Las Cruces, has obtained very favorable treatment reflected in the Offer of Judgment made by New Mexico and accepted by NMSU. *See* Offer of Judgment, *State of New Mexico v. Elephant Butte Irrigation Dist.*, No. CV-96-888, SS-97-104 (Mar. 9, 2007).* NMSU would be recognized senior priority rights in numerous existing wells, with the ability to perfect the remainder of the potentially authorized diversion by beneficial use in future years, and expansive purposes and places of use, including some authorized use that can be supplied to the City of Las Cruces. Other combined rights of underground water and surface water also would have seniority (1890 for

groundwater and 1906 for surface water), with the authorized amounts to be determined in future proceedings.

A final example is the claim by EBID irrigators who are seeking the same priority as the Rio Grande Project for their supplemental irrigation wells. While that issue is as yet unresolved, conflating the priority of supplemental groundwater wells that augment or replace Project surface water allotments with the priority of Project surface water rights under New Mexico law would effectively eliminate the priority advantage of Project water rights vis-à-vis a substantial portion of the groundwater production in the Lower Rio Grande. With as many as 90% of EBID irrigators already having supplemental wells, if they are given the same priority as Project water rights and the United States (thus also Texas entities and irrigators) are forced to rely on priority calls, there is no feasible way to make this work. With these types of determinations being made, the approach of the adjudication court seems to assure that there will not be sufficient water to both maintain Project integrity and honor all the New Mexico rights being recognized.

SUMMARY OF ARGUMENT

New Mexico's Motion to Dismiss should be denied. Under a Rule 12(b)(6) analysis, Texas and the United States both clearly survive dismissal at this stage,

because both have pleaded factual claims showing entitlement to declaratory and injunctive relief. Compl. at ¶¶ 10-11, 18-20, 24-26; U.S. Compl. Interv. at ¶¶ 11-15. Texas' Compact claim is based on the operational integrity of the Rio Grande Project as it existed and was incorporated into the equitable apportionment between New Mexico and Texas under the Rio Grande Compact. It is that New Mexico obligation, not to dry up the drain water and return flows historically integral as part of Project functioning, that gives rise to this original action.

The flawed underpinnings of New Mexico's Motion to Dismiss are exposed, by New Mexico's history of allowing unregulated groundwater production to impact Project integrity, by prior inconsistent legal positions taken by New Mexico officials regarding the nature of its Compact obligations to Texas, and by the manner in which New Mexico characterizes Texas' and the United States' Complaints in order to assert that no legal relief could be granted.

ARGUMENT

I. New Mexico's Motion to Dismiss Side-Steps Texas' Actual Complaint.

A. Basis for Texas' Compact Claim

In order to contend that Texas' and the United States' Complaints should be dismissed under a Rule 12(b)(6) analysis, New Mexico (and Las Cruces, as *amicus*, both) have created straw-men for Texas'

Compact argument, and then proceed to dismantle them without addressing Texas' valid complaint. Most of New Mexico's argument supporting its Motion to Dismiss is framed in terms of three supposed claims: 1) that Texas asserts a state-line delivery obligation of New Mexico under the Compact; 2) that Texas claims a breach of a "1938 Condition" under the Compact; and 3) that Texas (and also the United States) claim New Mexico has a Compact duty to protect Reclamation's contract deliveries of Project water. N.M. Mot. Dismiss at 1-2; N.M. Br. at 20-22, 24-25, 40-41, 48-49; *see also* Las Cruces Amicus Br. at 4, 9, 10, 14-16. As addressed more fully in Texas' response brief, however, New Mexico purposefully reshapes Texas' (and the United States') claims in order to refute them. Consideration of their claims actually pleaded, together with the broader factual and legal context presented herein and by Texas' response, shows that the Motion to Dismiss should be denied.

The Rio Grande Compact has no quantified state-line delivery obligation for New Mexico deliveries to Texas, and Texas has not suggested that it does.[9] However, the Rio Grande Project's historical operation and the nature of the Project's operational integrity,

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[9] Neither does Texas claim that a "1938 Condition" governs the Compact parties' obligations, such as the 1947 Condition that is expressly imposed as part of the Pecos Compact between New Mexico and Texas. *See* Pecos River Compact of 1949, 63 Stat. 159; *Texas v. New Mexico*, 462 U.S. 554 (1983).

established at the time of Compact adoption in 1938 and fundamental to the equitable apportionment negotiated by the Compact states, does give rise to Texas' Complaint. Compl. at ¶¶ 11, 18-19. The Rio Grande Compact, and Texas' equitable share of the water, depends upon the integrity of the Project, namely the availability and connection of drain water and return flows from Project irrigation that are essential to Project water supply and operation. Without this Project integrity, no equitable apportionment is accomplished by the Rio Grande Compact, as between New Mexico and Texas. *Cf.* Rio Grande Compact, opening statement of Compact purpose, App. to Compl. at App. 1. Project integrity existing and relied upon when the Compact was entered into is the basis for New Mexico's obligation and Texas' Complaint. As Texas argues in its response, both the express terms of the Compact and the operation of the Project – already established for several decades by 1938 – limit New Mexico's jurisdiction over waters in the Lower Rio Grande. *Cf. New Jersey v. New York*, 523 U.S. 767 (1998) (silence of a compact may signify drafters' intent to rely on commonly understood facts and settled law).

New Mexico relies repeatedly on statements quoted from several letters to or from Texas' Compact Commissioner in 1938 (Frank B. Clayton), as support for its interpretation of Compact obligations. N.M. Br. at 11-14, 34-36, 43-44; App. to N.M. Br. at 25-32. In summary, Mr. Clayton described the rationale for setting New Mexico's delivery point at Elephant

Butte Reservoir, in terms of United States' control of Elephant Butte Dam, the geographical nature of the border and cross-border irrigation ditches, and the contractual relationships among the United States and the two irrigation districts. None of the reasons he invoked, however, detract from Texas' Compact claim; rather, these references to established, pre-Compact facilities and contractual relationships reflect an assumption that the Project's operational integrity would be maintained under the Compact.

B. No "Federalization" of State Water Rights and Administration

Las Cruces in its *amicus* brief supporting New Mexico's Motion to Dismiss also argues that the United States' legal theory in this original action would effectively "federalize" the administration of New Mexico state water rights. Las Cruces Amicus Br. at 10-11, 17-20.[10] This argument, however, is misplaced both because it fails to recognize the proper

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[10] Las Cruces' characterization of the "federalization" of New Mexico water rights also paints a far more dire picture of its own situation than what really exists. Las Cruces Amicus Br. at 4, 10-11. Preserving Project integrity under the Compact may mean that Las Cruces' groundwater pumping is limited, which may mean that Las Cruces needs to purchase Project water as part of its water supply. *Cf.* Act of February 25, 1920, 31 Stat. 451. Under this same federal statute, El Paso contracts with the United States and EPCWID to purchase virtually all of the surface water it receives, and is pleased to have this means of obtaining needed additional municipal supply.

relationship of Compact rights and obligations vis-à-vis other state law water rights adjudicated by New Mexico courts, and because the approach argued for in the United States' Complaint in Intervention does not purport to evade otherwise applicable federal reclamation laws.

First, the Rio Grande Project water rights encompassed in the Compact cannot be undermined by adjudication of a priority date for the Project that ignores the effect of the Compact on New Mexico's responsibility to ensure its Compact obligations are satisfied. Under this Court's precedent, those Compact obligations are superior to the rights of other Lower Rio Grande appropriators, regardless of the priority dates adjudicated under New Mexico state laws. An agreement made by compacting states for equitable apportionment of an interstate stream "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact." *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-06 (1938); *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36 (Ct. App. 1993) (citing *Hinderlider*).

Second, the United States' position in this original action, and as it relates to the United States' participation in the Lower Rio Grande Adjudication, is not an attempt to evade Section 8 of the Reclamation Act, 43 U.S.C. § 383, which is the general recognition under federal reclamation law of deference to state laws relating to water control, appropriation,

use and distribution, or the McCarran Amendment, 43 U.S.C. § 666, under which the United States waives sovereign immunity for purposes of state water rights adjudications. Both of these key provisions governing the United States' role in water rights administration are still valid and applicable, to the extent they are not inconsistent with the Rio Grande Compact.

II. New Mexico's Motion to Dismiss Ignores the Prior Acknowledgment of New Mexico Officials of a Compact Obligation to Project Integrity.

New Mexico's Motion to Dismiss should be denied for the additional reason that New Mexico now takes a position on Compact interpretation that is contrary to the prior established position of New Mexico on this issue. Over a period of years as the problem of groundwater overproduction in the Lower Rio Grande Basin continued to grow, the New Mexico State Engineer developed and publicized a technical and legal position that actually supports Texas' claims in this original action. That is, not only has the rampant groundwater depletion in the Lower Rio Grande clearly affected Project operation by reducing or even drying up hydrologically connected seepage and drain flows, but because this impacts the Project function as historically operated, New Mexico is vulnerable to precisely the Compact-based challenge brought by Texas and supported by the United States in this original action. *See generally* D'Antonio PowerPoint

(2005); Barroll PowerPoint (2005); Fuchs Memorandum (2003). As the problem reached critical proportions, the New Mexico Legislature took action in 2003, also emphasizing the imperative need for compact compliance. NMSA § 72-2-9.1 (1978).

Although New Mexico's Motion to Dismiss is predicated upon its insistence that its Compact obligations end when water is delivered into Elephant Butte Reservoir, N.M. Br. at 15, El Paso would point out that this has not always been New Mexico's position. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), when El Paso sought to produce and export groundwater from New Mexico for use in El Paso, New Mexico argued that the Rio Grande Compact apportioned the surface waters of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related groundwater below Elephant Butte. *Id.* at 382. Further, New Mexico argued that the Rio Grande Project's division of water released from Elephant Butte Reservoir operated to apportion between Texas and New Mexico water not expressly apportioned by the Compact. *Id.* at 386. For these reasons, New Mexico asserted that El Paso could not take groundwater from New Mexico without violating the Rio Grande Compact.

The district court in *City of El Paso v. Reynolds* ruled against New Mexico's construction of the Rio Grande Compact, but its ruling does not detract from Texas' current cause of action. In that case, New Mexico was arguing that the district court lacked jurisdiction because the case involved a Compact

construction issue and Colorado, Texas and the United States were indispensable parties. *Id.* at 382. The district court, however, ruled that the Compact signatories were not indispensable parties and "[n]ot being parties to this action, they are not bound by the judgment herein." *Id.* Moreover, the court expressly stated:

> Contrary to defendants' contention, a decision that the compact does not apportion the river below Elephant Butte does not mean that New Mexico, having made its delivery, could undermine it by pumping down the surface flow of the river below the point of delivery. *This opinion does not address that issue at all.*

Id. at 386 (emphasis added). Thus, *City of El Paso v. Reynolds* shows that New Mexico has previously argued precisely the Compact construction suggested by Texas' Complaint and that the rejection of this argument by the district court did not address the merits of New Mexico's argument and provides no precedent for this Court hearing Texas' Complaint.

It appears that there has been a change in administration within New Mexico from which the State Engineer no longer acknowledges New Mexico's need to protect Rio Grande Project deliveries to Texas against the impacts of expansive groundwater pumping in the Lower Rio Grande Basin. Not only has this position shifted, but now also the New Mexico Attorney General is challenging the 2008 Operating Agreement entered into by EBID, along with the

United States and EPCWID in Texas, rather than supporting and enforcing this agreement. *See New Mexico v. United* States, No. 11-CV-0691 (D.N.M. filed Aug. 8, 2011). In order to protect Project deliveries to EPCWID, the Operating Agreement effectively reduces the delivery of Project water to EBID by an amount needed to make up for the impact of New Mexico groundwater pumping on deliveries of Project water to EPCWID. Texas' Complaint is based on the Compact parties' understanding that the drain water and return flows from irrigation within EBID are a critical component of the Project's operational integrity, and part of the equitable apportionment to Texas under the Rio Grande Compact.

CONCLUSION

For the reasons set forth above, as well as those set forth in the responses of Texas and of the United States, New Mexico has not established that Texas' Complaint or the United States' Complaint in Intervention fail to state claims upon which relief can be granted. New Mexico's Motion to Dismiss should be denied.

Respectfully submitted,

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